

**A      KETUA PENGARAH JABATAN HAL EHWAL ORANG ASLI &  
ANOR v. MOHAMAD NOHING (BATIN KAMPUNG BUKIT ROK)  
         & ORS AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA  
MOHD ZAWAWI SALLEH JCA  
**B      VERNON ONG LAM KIAT JCA  
         ABDUL RAHMAN SEBLI JCA**  
[CIVIL APPEALS NO: C-01-45-02-2013 & C-01-85-03-2013]  
13 OCTOBER 2015

**C      *LAND LAW:* Customary land – Right to – Notice of eviction to Semelai aboriginal  
people – Whether Semelais were identifiable native aborigine group – Whether  
native customary rights extended to areas of lands used for hunting, roaming and  
foraging – Whether continuous occupation over disputed land shown – Whether  
there was sufficient measure of control to prevent strangers from interfering on land  
**D      – Whether alienation legal****

*NATIVE LAW AND CUSTOM: Land dispute – Customary rights over land –  
Extinguishment of – Whether only by way of clear and unambiguous legislation  
– Whether gazetted Malay Reserve Land takes precedence over customary title –  
Whether Malay Reservations Enactment 1913 and Malay Reservations Enactment  
**E      1933 provide for Malay Reserve Land to take precedence over customary title –  
Whether Malay Reserve Land encroached upon customary land***

The respondents, of Semelai tribe aboriginal people residing at the settlement  
area of Kampong Bukit Rok and Kampung Ibam, Mukim Bera, Pahang,  
claimed native customary land on three areas called Padang Kepayang,  
**F      Kampung Bukit Rok and Kampung Ibam. In 2000, the Director of Land and  
Mines, State of Pahang and Pahang State Government (‘the State appellants’)  
approved 500 acres of land situated at Padang Kepayang, Kampung Batu  
Papan, Mukim Bera for the purposes of cultivating oil palm trees to be  
undertaken by FELCRA. In 2007, eviction notice, addressed to the  
**G      respondents occupying the area known as Padang Kepayang, were issued  
requiring the respondents to remove huts and/or buildings erected on Padang  
Kepayang and to leave Padang Kepayang within 14 days of the notice. As a  
result, the respondents filed an application for judicial review against the  
State appellants and the Director General of the Department of Orang Asli  
**H      Affairs and the Government of Malaysia (‘the Federal appellants’) seeking,  
inter alia, an order of certiorari, a prohibitory order and several declarations  
together with consequential orders. The High Court Judge held that (i) the  
Semelais were an identifiable native aborigine group who had existed in the  
Bera region for a very considerable period of time; (ii) the respondents were  
**I      descendants of the Semelais; and (iii) the area claimed had been amply  
identified. It was also held that the respondents’ rights over the lands accrued  
to the Semelais the minute they set foot in the Bera region and any other********

alienation after the period was illegal, including the area gazetted as Malay Reserve Land in 1923 and the setting up of the FELCRA scheme. The High Court Judge further held that the area of the land to be alienated for the purpose of the aborigine community should be made on the basis of the size of the community and the extent they should be allowed to roam and forage. Hence, the appeals by the appellants. The State appellants submitted that the customary land was limited to the settlement areas and excluded the forest at large for hunting, roaming and foraging and that the key factor in determining the extent of customary land is continuous occupation. It was contended by the appellants that there was no continuous occupation over the disputed area of Padang Kepayang since 1971. The Federal appellants, on the other hand, contended that the order of the High Court Judge to de-gazette the Malay Reserve Land was in excess of jurisdiction. The issues for the court's determination in the present appeals were: (i) whether native customary rights extended to areas of lands used for hunting, roaming and foraging; and (ii) whether a gazetted Malay Reserve Land takes precedence over any customary title.

A

B

C

D

**Held (allowing appeal in part)**

**Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:**

- (1) The distinction between settled and unsettled land is not really important; what is more significant is whether there is exclusive occupation and continuous use of the subject land. The native customary rights are established by the aborigines' occupation of the subject land. Whilst actual physical presence on the land is not necessary, there can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. (para 40)
- (2) There was no evidence produced by the respondents to show that there exists sufficient let alone any measure of control to prevent strangers from interfering on the land. In fact, the first respondent had admitted that he did not know the extent of the area used for roaming and foraging in Padang Kepayang; hence, showed that the respondents did not have any measure of control at all on the disputed land of Padang Kepayang. Accordingly, the trial judge had misdirected himself on the law and the facts in arriving at the finding that the area of the land to be alienated for the purposes of the aborigine community should include the area they should be allowed to roam and forage. (paras 41 & 42)
- (3) The map prepared by the Pengarah Perhutanan Negeri Pahang was in fact a plan attached to the forest clearance certificate pursuant to the Forest Rules 1987. The words 'Rezab Orang Asli Bukit Rok, Bera' is the 'Nama Kawasan' assigned to the area in question. It was not a certificate of the State Authority recognising the area delineated as native

E

F

G

H

I

- A customary land. Therefore, the plan attached to the forest clearance certificate did not support the respondents' claim as the forest clearance certificate was issued for the specific purpose under r. 5 of the Forest Rules. (para 43)
- B (4) Native customary rights of the aboriginal peoples can only be extinguished by clear, unambiguous and plain legislation or by an executive act expressly authorised by such legislation. The Malay Reserve Land was gazetted in 1923 pursuant to the Malay Reservations Enactment 1913 ('1913 Enactment') to provide for securing to Malays their interests in land. There is no provision to state that the Malay Reserve Land takes precedence over any customary title in the 1913 Enactment. The Malay Reservations Enactment 1933 ('1933 Enactment') which was enacted to amend and consolidate the law relating to Malay Reservation has extended the category of land that may be included in a Malay Reservation. (paras 50, 51, 53 & 54)
- C
- D (5) There is no reference to customary land in the 1933 Enactment. In fact, it did not say that the Malay Reserve Land takes precedence over customary land. In the absence of a clear and unequivocal legislative intent to extinguish native customary land rights, the declaration under the 1913 Enactment of the Bera Malay Reservation does not extinguish
- E the customary land rights of the aboriginal people. (para 57)
- (6) The Bera Malay Reservation Order of 1923 does not vest State land in any person; it only reserves the designated land as Malay Reservation under the 1913 Enactment. The lands so designated remains State lands which is encumbered by the customary land right of the respondents. In
- F the circumstances, the second question was answered in the negative. The court upheld the declaration by the trial judge that the portion of the Malay Reserve Land encroaching upon the customary land of the respondents and therefore had to be de-gazetted. (para 58 & 59)
- G (7) The area of the land to be alienated for the purpose of the aborigine community should be settled areas and the areas under which are planted rubber trees, oil palm trees or other trees by the aborigine community. Accordingly, the order of the High Court was varied to the extent that the identification and drawing of boundaries of the respondents' customary land using natural boundaries of rivers and hills
- H shall correspond as close as possible to the area claimed. (para 60)

***Bahasa Malaysia Translation Of Headnotes***

- I Responden-responden, orang asli daripada suku kaum Semelai yang menetap di kawasan pendudukan Kampong Bukit Rok and Kampong Ibam, Mukim Bera, Pahang, menuntut tanah adat orang asli atas tiga kawasan yang dikenali sebagai Padang Kepayang, Kampung Bukit Rok dan Kampung Ibam. Pada 2000, Pengarah Tanah dan Galian, Negeri Pahang dan Kerajaan Negeri

Pahang ('perayu-perayu Negeri') meluluskan 500 ekar tanah yang terletak di Padang Kepayang, Kampung Batu Papan, Mukim Bera bagi tujuan penanaman pokok-pokok kelapa sawit yang diuruskan oleh FELCRA. Pada 2007, notis pengusiran, dialamatkan kepada responden-responden yang menduduki kawasan yang dikenali sebagai Padang Kepayang, dikeluarkan meminta responden-responden mengalihkan pondok-pondok/bangunan yang didirikan di Padang Kepayang dan meninggalkan Padang Kepayang dalam tempoh 14 hari dari tarikh notis. Justeru, responden-responden memfailkan permohonan untuk semakan kehakiman terhadap perayu Negeri dan Ketua Pengarah Jabatan Hal Ehwal Orang Asli dan Kerajaan Malaysia ('perayu Persekutuan') memohon, antara lain, satu perintah *certiorari*, perintah larangan dan beberapa deklarasi bersama-sama dengan perintah-perintah lanjut. Hakim Mahkamah Tinggi memutuskan bahawa (i) suku kaum Semelai adalah kumpulan orang asli yang dikenali wujud di kawasan Bera bagi tempoh yang lama; (ii) responden-responden berketurunan Semelai; dan (iii) kawasan yang dituntut telah dikenal pasti dengan sewajarnya. Diputuskan juga bahawa hak responden-responden terhadap tanah tersebut terakru kepada suku kaum Semelai sebaik sahaja mereka menjejaskan kaki di kawasan Bera dan apa-apa pemberi milikan selepas tempoh tersebut adalah tidak sah, termasuk kawasan yang diwartakan sebagai Tanah Rizab Melayu dalam tahun 1923 dan pembentukan skim FELCRA. Hakim Mahkamah Tinggi selanjutnya memutuskan bahawa kawasan tanah yang diberi milik bagi tujuan masyarakat orang asli wajar dibuat atas dasar saiz masyarakat tersebut dan takat mereka boleh dibenarkan untuk merayau-rayau dan mencari makanan. Oleh itu, rayuan-rayuan oleh perayu-perayu. Perayu Negeri menghujahkan bahawa tanah adat adalah terhad kepada kawasan penetapan dan tidak termasuk keseluruhan kawasan hutan bagi berburu, merayau-rayau dan mencari makanan dan faktor utama dalam menentukan takat tanah adat adalah pendudukan secara berterusan. Dihujahkan oleh perayu-perayu bahawa tiada pendudukan berterusan atas tanah yang dipertikaikan di Padang Kepayang semenjak tahun 1971. Perayu-perayu Persekutuan, sebaliknya, menghujahkan bahawa perintah Hakim Mahkamah Tinggi untuk membatalkan warta Tanah Rizab Melayu melampaui bidang kuasa. Isu-isu untuk pertimbangan mahkamah dalam rayuan-rayuan ini adalah: (i) sama ada hak adat orang asli dilanjutkan ke kawasan tanah-tanah yang digunakan untuk memburu, merayau-rayau dan mencari makanan; dan (ii) sama ada Tanah Rizab Melayu yang diwartakan mengatasi hak milik tanah adat.

**Diputuskan (membenarkan sebahagian rayuan)**

**Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:**

- (1) Perbezaan antara tanah yang diduduki dengan yang tidak diduduki tidak begitu penting; apa yang lebih penting adalah sama ada terdapat pendudukan eksklusif dan penggunaan berterusan tanah tersebut. Hak adat orang asli dibentuk oleh pendudukan orang asli di tanah tersebut.

- A Walaupun kehadiran secara fizikal atas tanah tersebut tidak diperlukan, boleh ada pendudukan tanpa kehadiran secara fizikal asalkan wujud kawalan yang mencukupi untuk menghalang gangguan daripada orang luar.
- B (2) Tiada keterangan yang dikemukakan oleh responden-responden untuk menunjukkan bahawa wujud kawalan yang mencukupi atau apa-apa kawalan untuk menghalang gangguan oleh orang luar terhadap tanah tersebut. Malahan, responden pertama telah mengakui bahawa dia tidak mengetahui takat kawasan yang digunakan untuk merayau-rayau dan mencari makanan di Padang Kepayang; dengan itu menunjukkan bahawa
- C responden-responden tidak mempunyai apa-apa cara kawalan atas tanah yang dipersoalkan di Padang Kepayang. Hakim bicara tersalah arah dari segi undang-undang dan fakta dalam membuat dapatan bahawa kawasan tanah untuk diberi milik bagi tujuan masyarakat orang asli sepatutnya termasuk kawasan yang mereka boleh dibenarkan untuk merayau-rayau dan mencari makanan.
- D (3) Peta yang disediakan oleh Pengarah Perhutanan Negeri Pahang sebenarnya pelan yang dikepilkan kepada sijil pembebasan hutan menurut Kaedah-Kaedah Hutan 1987. Perkataan 'Rezab Orang Asli Bukit Rok, Bera' adalah 'Nama Kawasan' yang diberikan kepada
- E kawasan yang dipersoalkan. Ia bukan sijil oleh Pihak Berkuasa Negeri mengakui kawasan yang digariskan sebagai tanah adat orang asli. Oleh itu, pelan yang dikepilkan pada sijil pembebasan hutan tidak menyokong tuntutan responden-responden kerana sijil pembebasan hutan dikeluarkan untuk tujuan spesifik di bawah k. 5 Kaedah-Kaedah-Kaedah Hutan.
- F (4) Hak adat orang asli hanya boleh diluputkan oleh perundangan yang jelas atau oleh tindakan eksekutif yang jelas diberikuasa oleh perundangan tersebut. Tanah Rizab Melayu diwartakan dalam tahun 1023 menurut Enakmen Rizab Melayu 1913 ('Enakmen 1913') untuk memperuntukkan
- G perlindungan terhadap kepentingan dalam tanah kepada orang-orang Melayu. Tidak ada peruntukan dalam Enakmen 1913 yang menyatakan bahawa Tanah Rizab Melayu mengatasi mana-mana hak milik adat. Enakmen Rizab Melayu 1933 ('Enakmen 1933') yang digubal untuk meminda dan menggabungkan undang-undang berkaitan Rizab Melayu
- H telah melanjutkan kategori tanah yang boleh dimasukkan dalam Rizab Melayu.
- I (5) Tidak ada rujukan pada tanah adat dalam Enakmen 1933. Malah, ia tidak menyebut bahawa Tanah Rizab Melayu mengatasi tanah adat. Tanpa niat perundangan yang jelas untuk meluputkan hak tanah adat orang asli, deklarasi di bawah Enakmen 1913 bagi Rizab Melayu Bera tidak meluputkan hak tanah adat orang asli.

- (6) Perintah Rizab Melayu Bera 1923 tidak meletak hak tanah Negeri kepada mana-mana orang; ia hanya menguntukkan tanah yang ditetapkan sebagai Rizab Melayu di bawah Enakmen 1913. Tanah yang diperuntukkan itu kekal sebagai tanah Negeri yang dihalang oleh hak tanah adat responden-responden. Dalam keadaan tersebut, soalan kedua dijawab secara negatif. Mahkamah mengesahkan deklarasi oleh hakim bicara bahawa sebahagian Tanah Rizab Melayu mencero bohi tanah adat responden-responden dan oleh itu warta dibatalkan. A  
B
- (7) Bahagian tanah yang diberi milik bagi tujuan masyarakat orang asli sepatutnya kawasan yang ditetapkan dan bahagian di mana ditanam dengan pokok-pokok getah, kelapa sawit atau polik-pokok lain oleh masyarakat orang asli. Dengan itu, perintah Mahkamah Tinggi diubah setakat pengenalanpastian dan lukisan sempadan tanah adat responden-responden menggunakan sempadan semulajadi sungai dan bukit mesti sejajar mungkin dengan kawasan yang dituntut. C

**Case(s) referred to:**

- Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885 HC (*refd*) D  
*Alexkor Ltd v. Richtersveld Community* [2003] 12 BCLR 130 (*refd*)  
*Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399 (*refd*)  
*Calder v. A-G (British Columbia)* [1973] SCR 313 (*refd*)  
*Delgamuukw v. The Queen in right of British Columbia et al; First Nations Summit et al, interveners* (1997) 153 DLR (4th) (*refd*) E  
*Johnson and Graham's Lessee v. William M'Intosh* (1823) 21 US 681 (*refd*)  
*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169 CA (*refd*)  
*Mabo v. Queensland* (1991-1992) 175 CLR 1 (*refd*)  
*Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 HC (*refd*)  
*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 FC (*refd*) F  
*Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555 CA (*refd*)  
*The Wik Peoples v. The State of Queensland & Ors* (1996) 187 CLR 1 (*refd*)

**Legislation referred to:**

- Aboriginal Peoples Act 1954, s. 10 G  
 Federal Constitution, arts. 8(5)(c), 13, 89(1), (3), (4)  
 Forest Rules 1987, rr. 2, 5  
 Malay Reservations Enactment, ss. 3(i), 4(i), 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21  
 (Civil Appeal No: C-01-45-02-2013) H  
 For the appellants - Shamsul Bolhassan (Kamal Azira Hasan & Mazlifah Ayob with him); AG's Chambers  
 For the respondents - Lim Heng Seng (Yogeswaran Subramaniam & Tan Hooi Ping with him); M/s Lee Hishammuddin Allen & Gledhill  
 (Civil Appeal No: C-01-85-03-2013) I  
 For the appellants - Ahmad Hanir Hambaly; State Legal Advisor, Pahang  
 For the respondents - Lim Heng Seng (Yogeswaran Subramaniam & Tan Hooi Ping with him); M/s Lee Hishammuddin Allen & Gledhill

A *[Editor's note: For the High Court judgment, please see Mohamad Nohing & Ors v. Pejabat Tanah Dan Galian Negeri Pahang & Ors [2013] 9 CLJ 533 (overruled in part).]*

*Reported by S Barathi*

## JUDGMENT

B

**Vernon Ong Lam Kiat JCA:**

### **Introduction**

C

[1] The appeals stem from the decision of the High Court given on 19 December 2012 granting several declarations pertaining to the respondents' claim of native customary lands. The High Court also made consequential orders including the following:

D

(i) directing the Director of Land and Mines, State of Pahang and the Pahang State Government to identify and draw the boundaries of the claim using natural boundaries of rivers and hills and to take steps to *gazette* the customary lands of the respondents;

E

(ii) the land utilised by FELCRA that encroaches upon the customary lands to be vacated and the boundaries set up to be removed at FELCRA's costs; and

F

[2] Appeal No. 85 is the appeal by the Director of Land and Mines, State of Pahang and the Pahang State Government ("the State appellants"). Appeal No. 45 is the appeal by the Director General of the Department of Orang Asli Affairs and the Government of Malaysia ("the Federal appellants").

G

[3] Both appeals were heard together on 7 August 2015. After hearing of counsel for the parties, we adjourned the proceedings to a date to be fixed for the delivery of our decision. We now give our grounds of decision.

### **The Salient Facts**

H

[4] The respondents are Semelai tribe aboriginal peoples residing at the settlement area of Kampong Bukit Rok and Kampong Ibam, Mukim Bera, Pahang.

I

[5] The respondents' claim of native customary lands includes three areas called Padang Kepayang, Kampung Bukit Rok and Kampung Ibam.

[6] On 20 December 2000, the State appellants approved 500 acres (202.3 hectares) of land situated at Padang Kepayang, Kampung Batu Papan, Mukim Bera, Daerah Bera, Pahang for the purposes of cultivating oil palm trees to be undertaken by FELCRA.

[7] On or about 12 March 2007, several of the respondents were issued a eviction notice intituled “PENDUDUKAN TANAH KERAJAAN TANPA KEBENARAN PIHAK BERKUASA NEGERI” addressed to the respondents occupying the area known as Padang Kepayang. The respondents were required to remove huts and/or buildings erected on Padang Kepayang and to leave Padang Kepayang within 14 days of the eviction notice.

[8] As a result, the respondents filed an application for judicial review against the State appellants and the Federal appellants at the Temerloh High Court on 19 April 2007 seeking *inter alia*, an order of *certiorari*, a prohibitory order and several declarations together with consequential orders.

### Findings Of The High Court

[9] The learned judge made the following findings of fact:

- (i) the Semelais are an identifiable native aborigine group who have existed in the Bera region for a very considerable period of time;
- (ii) the respondents are the descendants of the Semelais; and
- (iii) the area claimed has been amply identified.

[10] The learned judge also held that the respondents’ rights over the lands accrued to the Semelais the minute they set foot in the Bera region. Any other alienation after the period where the right first accrued is illegal; this includes the area gazetted as Malay reserve land in 1923 and the setting up of the FELCRA scheme.

[11] The learned judge further held that the area of the land to be alienated for the purpose of the aborigine community should be made on the basis of the size of the community and the extent they should be allowed to roam and forage.

### Submission Of Parties

[12] Learned counsel for the State appellants and the Federal appellants canvassed their appeals on two main grounds.

#### *State Appellants’ Submission*

[13] The first argument advanced by counsel for the State appellants is that the customary land is limited to the settlement area and excludes the forest at large for hunting, roaming and foraging.

[14] Learned counsel argued that the learned judge erred in law and fact in allowing the respondents’ claim over the disputed land for roaming and foraging. Whilst conceding that the common law is applicable, learned counsel argued that common law only recognises the claim of customary

A lands to areas which form their settlement and not the area where they used to roam and forage in the jungle (*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555).

B [15] Learned counsel further argued that the key factor in determining the extent of customary land is continuous occupation (*Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509; [2008] 2 MLJ 677). The respondents had moved from Padang Kepayang for good since 1971. As the respondents only use Padang Kepayang for roaming and foraging in the jungle there is no continuous occupation over the disputed area of Padang Kepayang since 1971.

C [16] The learned judge's finding is not based on the land inherited from the forefathers; but based on the size of the community. Under cross-examination, the first respondent admitted that he was not certain of the extent of the roaming and foraging area.

D [17] Before the State Authority approved the plan, investigations were conducted on the disputed lands which found no traces of aboriginal people's occupation or settlement over the disputed lands.

*Federal Appellants' Submission*

E [18] The second ground advanced by the Federal appellants is that the order of the learned judge to de-gazette the Malay reserve land is in excess of jurisdiction.

F [19] Learned counsel for the Federal appellants argued that the declaration was not prayed for nor pleaded by the respondents in their application.

G [20] Learned counsel also argued that the power to revoke the status of Malay reserve land lies in the hand of the Menteri Besar in consultation with the Ruler in Council (ss. 3(i) & 4(i) of the Malay Reservation Enactment (FMS Cap 142)). Under art. 89(1) of the Federal Constitution, any Malay reserve land gazetted before Merdeka Day may continue as a Malay reservation unless otherwise provided for by a subsequent Enactment which needs to be passed by the State Legislative Assembly and each House of Parliament. Further, for any Malay reserve land that ceased its status, another land of a similar character must be procured as replacement (art. 89(3) of the Federal Constitution).

H [21] Learned counsel also added that there is nothing to stop the respondents from remaining on the portions of disputed lands which have been declared as Malay reserve land. The respondents are not obliged to leave the areas that have been declared as Malay reserve lands (s. 10 of the Aboriginal Peoples Act 1954 (APA 1954)).

I

[22] Learned counsel argued that the learned judge was right in not granting any form of damages to the respondents. As such, the declaration to excise the portion of the Malay reservation to be given to the respondents is redundant to the existing rights under the APA 1954 that are enjoyed by the respondents.

A

*Respondents' Submission In Reply*

B

[23] In reply to the State appellants' arguments, learned counsel for the respondents referred to a map prepared by the Pengarah Perhutanan Negeri Pahang. According to the map, the area demarcated as "Rezab Orang Asli Bukit Rok, Bera" contains an area of 2,023.47 hectares. The respondents moved away from the customary lands in 1971 due to floods; the rubber trees the respondents planted on the customary lands remained. The move was only temporary and the respondents continued to be in occupation of the customary lands. It is not necessary for the respondents to be in continuous occupation of the lands in order to assert their native customary land rights.

C

D

[24] The learned judge was correct in finding that not all the customary lands were used for farming; the rest were utilised for hunting and foraging. The learned judge was also correct in ordering the disputed lands to be properly surveyed to take account of the fact that the area of the respondents' customary lands has shrunk due to development by FELCRA.

E

[25] Learned counsel also argued that the investigations which found no traces of aboriginal settlements on the disputed lands is wrong as the map clearly shows that the area was cultivated by the respondents.

[26] In reply to the arguments of the Federal appellants, learned counsel submitted that the APA 1954 does not extinguish the customary land rights of aboriginal people (*Sagong Tasi, supra*). There are constitutional grounds for challenging the validity of the Malay reserve land under which the Bera Malay Reservation Order was made. Article 89(4) of the Federal Constitution provides that "Nothing in this article shall authorise the declaration as a Malay reservation of any land which at the time of the declaration is owned or occupied by a person who is not a Malay or in or over which such person has then any right or interest".

F

G

[27] It was also argued that the Malay Reservation Enactment should be applied with the necessary modifications to bring it into accord with the Federal Constitution in particular, with art. 89(4) and the special position of the aboriginal peoples conferred by art. 8(5)(c). Read together with these articles, the Malay Reservation Enactment does not authorise the respondents' customary lands being declared as Malay reservation. Accordingly, the fact that a large part of the customary lands was gazetted in 1923 as Malay reservation lands does not detract from the fact that the customary lands were and remain ancestral lands of the respondents. As

H

I

- A such, the respondents possess unextinguished and legally enforceable customary rights and interests to and over the customary lands. Therefore, there are constitutional grounds for challenging the validity of the Malay Reservation Enactment under which the Bera Malay Reservation Order was made. In the light of the findings of the learned judge, the order to de-gazette
- B the portion of the Malay reserve land encroaching upon the customary lands is a consequential order.

**Aboriginal Peoples' Rights In Their Customary Land**

- C [28] The genesis of the recognition of the aboriginal peoples' proprietary rights in their customary and ancestral lands may be said to have taken root in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885; [1997] 1 MLJ 418. In that case, a group of aborigines living around the Sungai Linggui catchment area brought a representative action for a declaration that the lands acquired by the State Government for the construction of a dam was aboriginal area or aboriginal reserve and for
- D compensation. The court recognised that aboriginal peoples had usufructuary rights (for use and enjoyment of land), rights over land but not in and to the land. The court found that aborigines had rights at common law over the land vested in the State and that such rights existed despite the APA 1954. Accordingly, the aborigines were compensated for the loss of land use and
- E livelihood over the land; but they were not compensated for the loss of their proprietary interests in and to the land.

- [29] The finding of the High Court in the *Adong Kuwau* case was upheld by the Court of Appeal; an appeal to the Federal Court against the decision of the Court of Appeal was dismissed.

- F [30] The next significant development came about in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543; [2002] 2 MLJ 591, the aborigines of the Temuan tribe brought a representative action for unlawfully eviction from their lands following the acquisition of 38,477 acres of their land for the purposes of construction of the highway to the Kuala Lumpur International Airport. Whilst they received compensation for the loss of their crops, fruit trees and homes, they were not compensated for the loss of the land. Their claim for a proprietary interest in the land was not recognised by the Government. The eviction was conducted by a police operation with support of the FRU in the presence of officials from the Sepang District
- G Office and of the Jabatan Hal Ehwal Orang Asli. The fruit trees and crops on the land were destroyed and their homes, cultural hall and community hall were demolished.

- H [31] The plaintiffs' claim was for recognition of their proprietary rights to the land and compensation for breach of art. 13 of the Federal Constitution and for trespass. The plaintiffs also contended that the Government owed
- I

them a fiduciary duty based on constitutional provisions which required the Government to protect and ensure the advancement and welfare of the aboriginal peoples in Malaysia.

A

[32] In the landmark decision, the High Court granted recognition to the aboriginal peoples' rights in and to the customary lands and not merely the rights of use and enjoyment over the land. The High Court relied on the following authorities: *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399; *Mabo v. Queensland* (1991-1992) 175 CLR 1; *The Wik Peoples v. The State of Queensland & Ors* (1996) 187 CLR 1; *Delgamuukw v. The Queen in right of British Columbia et al*; *First Nations Summit et al, interveners* (1997) 153 DLR (4th); and *Johnson and Graham's Lessee v. William M'Intosh* (1823) 21 US 681.

B

C

[33] The High Court recognised that the native title to the settled areas of the land taken, was a proprietary interest in and to the land, and ordered that compensation be paid to the plaintiffs under the Land Acquisition Act 1960. However, as the decision only dealt with settled areas of the land, the question of whether these rights extend to the areas where the aboriginal peoples roam, forage and hunt or fish was not settled.

D

#### Decision

[34] To recapitulate, the first issue relates to the question of whether native customary rights extended to areas of lands used for hunting, roaming and foraging. The second issue relates to the question of whether a gazetted Malay reserve land takes precedence over any customary title.

E

[35] On the first issue, we note that the learned judge's finding is predicated on the following grounds:

F

- (a) Since the law recognises the rights of the aborigines over land it must also give rights and recognition of the customary activities carried out by the aborigines which includes hunting, roaming and foraging in the jungle;
- (b) The provision of modern amenities does not preclude the aborigines from claiming the land for the purpose of foraging and roaming the jungle;
- (c) The learned judge accepted the first respondent's testimony that foraging and roaming of the jungle was something which the community could not give up despite being provided the comforts of modern living;
- (d) The area of the land to be alienated for the purpose of the aborigine community should take into the facts of each case into consideration, the size of the community and to what extent they should be allowed to roam and forage (*Alexkor Ltd v. Richtersveld Community* [2003] 12 BCLR 130); and

G

H

I

- A (e) The learned judge agreed with the opinion of Dr Collins that the respondents' dependence on the land for sustenance and wellbeing still remains the same even though there had been a change of activities of Semelais from purely subsistence activities to more cash-based activities such as rubber and oil palm cultivation as well as small businesses.
- B [36] In *Sagong Tasi (supra)*, the learned judge had reviewed the international jurisprudence on the content of common law native title and the cases cited in para. [28] above. The learned judge went on to hold that:
- C Therefore in keeping with the worldwide recognition now given to aboriginal rights, I conclude that proprietary interest of the Orang Asli in the customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not the jungles at large where they used to forage for their livelihood in accordance with their tradition. As to the area of settlement and its size, it is a question of fact in each case. In this case the land is clearly within their settlement. I hold that the plaintiff's proprietary
- D interest in it is an interest in and to the land.
- E [37] The same sentiment was expressed by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Anor Appeal (supra)*. Hashim Yusoff JCA speaking for the Court of Appeal said at p. 570:
- F From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors (supra)* that the claim should not be extended to areas where they used to roam and forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.
- G [38] We do not think that *Alexkor Ltd v. Richtersveld Community (supra)* supports the proposition that native land rights extended to areas of land used for hunting or foraging. The passage cited by the learned judge is as follows:
- H In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and the LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface.
- I [39] In our view, if the words "the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface" are read within the context of the whole passage, it is clear that

the said words are intended to amplify the rights enjoyed by the community on the subject land. We do not agree that the said words can be interpreted to mean that the extent the respondents should be allowed to roam and forage is a factor to be considered in determining the area of the land to be alienated for the aboriginal community. The point made by the Constitutional Court of South Africa in *Alexkor's* case was that the Richtersveld Community had the right of ownership on the basis of exclusive use and occupation of the subject land.

[40] In our view, the distinction between settled and unsettled lands is not really important; what is more significant is whether there is exclusive occupation and continuous use of the subject land. In *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong (supra))*, the Federal Court said that the proposition of law as enunciated in *Mabo (No. 2)* [1992] 175 CLR 1 and *Calder v. A-G (British Columbia)* [1973] SCR 313 reflected the common law position with regards to native titles throughout the Commonwealth. More pertinently, the Federal Court held that the determinant factor of native title is the element of control over the land exhibited by the claimant and not so much the use of the land. At p. 532 (CLJ); p. 694 (MLJ), Arifin Zakaria FCJ (as he then was) said:

On the issue of what is meant by 'occupation', we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: See *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit bin Matusin & Ors v. Superintendent of Lands and Surveys & Anor* [1991] 2 CLJ 1524. Therefore, following the above authorities, the fact that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non-occupation of the said land.

[41] In the light of the principles enunciated in the abovementioned authorities, we agree with the State appellants that the native customary rights are established by the aborigines' occupation of the subject land. Whilst actual physical presence on the land is not necessary, there can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. In this case, there is no evidence produced by the respondents to show that there exists sufficient let alone any measure of control to prevent strangers from interfering on the land. In fact, the first respondent admitted under cross-examination that he did not know the extent of the area used for roaming and

- A foraging in Padang Kepayang; the uncertainty lends support to the State appellants' argument that the respondents do not have any measure of control at all on the disputed land of Padang Kepayang.

[42] Accordingly, we are constrained to hold that the learned judge misdirected himself on the law and on the facts in arriving at the finding that the area of the land to be alienated for the purposes of the aborigine community should include the area they should be allowed to roam and forage.

[43] There is one final point relating to the map prepared by the Pengarah Perhutanan Negeri Pahang referred to by learned counsel in support of the respondents' claim of native customary lands in the Bera region. A close perusal of the documents in question shows that the map is in fact a plan attached to a "SIJIL PEMBEBASAN HUTAN" (forest clearance certificate) dated 24 March 1983 pursuant to the Forest Rules 1987 (FR 1987) under the National Forestry Act 1984. According to r. 2 of the FR 1987, the words "forest clearance certificate" means a document issued by the director to confirm that the area specified therein does not contain any more timber which can be economically harvested". Rule 5 of the FR 1987 provides that a forest clearance certificate may be issued by the director if he is satisfied that the area under consideration does not contain any more timber that can be economically harvested and that such clearance shall be as determined by the director. With respect, we do not think that the plan attached to the forest clearance certificate supports the respondents' claim. The words "Rezab Orang Asli Bukit Rok, Bera" is the "Nama Kawasan" assigned to the area in question. It is not a certificate of the State Authority recognising the area delineated as native customary land. It is a description and is at best indicative. At any rate, it must be borne in mind that the forest clearance certificate was issued for the specific purpose under r. 5.

[44] We now turn to the second issue on the question of whether a gazetted Malay reserve land takes precedence over any customary title.

[45] According to renowned Malaysian historian Haji Buyong Adil in his *Sejarah Pahang* published by Dewan Bahasa dan Pustaka in 1984, the ancestors of today's Orang Asli groups lived in Pahang since the middle stone age period. According to the expert report of Dr Collin G Nicholas, the presence and occupation of the Semelai people in the Bera drainage area, ranging from the mouth of the Bera River at Kuala Bera, along the whole stretch of the Bera River and into Tasek Bera is acknowledged in documentary materials from various sources. There were also several earliest available maps in the area which show or indicate the presence and occupation of the Semelai people in the Bera drainage area.

[46] According to the first respondent, his family tree dates back to six generations before himself. Counting himself and his own eight children and 12 grandchildren, there are today at least eight generations of Semelai living

on the customary lands. Given that the Semelai of Bukit Rok and Ibam have been living in the customary lands for at least eight generations, it may be inferred that the Semelai of Bukit Rok and Ibam have occupied the customary lands for at least 240 years; that is to say since 1775.

[47] The point to note at the outset is that the Malaysian courts recognise the pre-existing native land rights of the aboriginal peoples. It has also to be accepted that by the common law even the Crown's acquisition of a radical title or ultimate title to the land did not confer absolute beneficial ownership of the land; and that the Crown's right or interest is subject to any native rights over such land. We would respectfully refer to the passage at p. 692 of *Madeli (supra)* where Arifin Zakaria FCJ (as he then was) said:

With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.

[48] In *Madeli (supra)*, the disputed land fell within the tract of land which was reserved as the Shell Concession Area pursuant to the Rajah Order made on 15 November 1921 ('the 1921 Order'). The 1921 Order also provided for the notification of the occupiers of the land under permit that the land so occupied belongs to the Government and that they will only be entitled to be compensated in respect of building erected or plant planted thereon. The land became an excepted area not earlier than 1954; as such the land was within the Shell Concession Area from 1921 and ending in 1954. By a *gazette* notification of 24 December 1982 ('the 1982 Notification'), the land was declared as a Government reserve for the purpose of a park. The respondent argued that the appellants should have paid him compensation for his native customary rights to the land before issuing the 1982 Notification. The State Authorities had admitted that the respondent had acquired native customary rights over the disputed land prior to 1 January 1958 which by implication included the period commencing from 1954 to 1 January 1958.

- A [49] More significantly, in *Madeli (supra)* the Federal Court considered the question of whether the 1921 Order had the legal effect of extinguishing the native customary rights over the land falling within the Shell Concession Area. Arifin Zakaria FCJ (as he then was) said at pp. 534-535 (CLJ); p. 696 (MLJ):
- B Let us consider the first point. It is not in dispute that the said land fell within the Shell Concession Area. But the real issue is; what is the legal effect of the 1921 Order on native customary rights over land falling within the Shell Concession Area which had been acquired or exercised prior to the 1921 Order. Does the 1921 Order have the effect of extinguishing those rights? The Court of Appeal relying on *Sugar Refining Co v. Melbourne harbour Trust Commissioners* [1827] AC 343 adopted the statutory interpretation that 'a statute should not be held to take away rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.' In this regard we agree with the Court of Appeal that there is no provision in the 1921 Order seeking to extinguish the respondent's right over the said land. All it did was to reserve the specified area of Miri District for the purpose of the operation of the Sarawak Oilfields Limited. What then is the effect of the said 'reservation'. Reading the 1921 Order we are of the view that its effect is merely to reserve a specified area for the purposes of the operations of the Sarawak Oilfields Limited. Future use of the land so reserved are governed by the said order, but it did not go further to provide that land which are already in occupation by native under the customary laws ceased to have effect and continued occupation of the land by the natives shall become illegal. *In the absence of such a provision in the 1921 Order, we agree with the Court of Appeal that the order could not be construed to have the effect of extinguishing the rights of the native over such land which had been in existence prior to the coming into force of the said order. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication.*
- F We are also of the view that to construe the 1921 Order in the manner proposed by the appellants would give the Order a retrospective force. This is so because the respondent had been in occupation of the said land long before the 1921 Order. It is an established principle of construction of statute that *prima facie* a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless the result is unavoidable on the language use: See *Yew Bon Tew & Anor v. Kenderaan Bas MARA* [1983] 1 MLJ 1. We find the 1921 Order did not seek to do so. As we see it, the provisions of regulations 2 if at all is only applicable to future occupation of the land in the reserved area but not to the existing occupiers. In short we would venture to say that the reservation under the 1921 Order is subject to all existing rights under the native customs of land tenure. We hold that it is too far reaching a consequence to construe the 1921 Order to have the effect of extinguishing all existing rights that had been in existence before the coming of James Brook. The 1921 Order did not expressly say so. (emphasis added)
- I

[50] In other words, Federal Court held that native customary land rights of the aboriginal peoples can only be extinguished by clear, unambiguous and plain legislation or by an executive act expressly authorised by such legislation. To adopt the words of the Federal Court, such a “drastic measure” must be justified in clear and unambiguous terms and not by mere implication.

A

B

[51] In this instance, the Malay reserve land was gazetted in 1923 pursuant to the Malay Reservations Enactment 1913 (1913 Enactment). The 1913 Enactment is an enactment to provide for securing to Malays their interests in land. Applying the principles enunciated in *Madeli (supra)*, the task of the court is to determine whether there is any provision in the 1913 Enactment which is expressed in clear and unambiguous language to say that the gazetted Malay reserve land takes precedence over and in the customary land.

C

[52] What is the legal effect of a declaration of Malay reserve land? Under the 1913 Enactment, once a land is gazetted as Malay reservation, all dealings in the Malay reserve land are subject to restrictions. The restrictions relate to *inter alia*, the alienation of any Malay reserve land and transfer of any interest in Malay reserve land (ss. 7 and 8), execution sales under a decree (s. 9) and charge sales (s. 10). It is also stipulated that all dealings or disposals and any attempts to deal or dispose in of Malay reserve land contrary to the 1913 Enactment shall be null and void (s. 13).

D

E

[53] There are altogether 16 sections in the 1913 Enactment. Other than the stipulation that any alienated land or State land may be included in a Malay reservation (s. 5), there is no reference to customary title at all. In fact, there is no provision to state that the Malay reserve land takes precedence over any customary title.

F

[54] On 15 December 1933, the Malay Reservations Enactment (1933 Enactment) was enacted to amend and consolidate the law relating to Malay Reservation and to provide for securing to Malays their interests in land. The 1933 Enactment defined the words “Malay reservation” to include a Malay reservation declared and gazetted as a Malay reservation under the 1913 Enactment.

G

[55] The 1933 Enactment is more comprehensive and comprises of 21 sections. The category of land that may be included in a Malay reservation has been extended. In addition to alienated land and State land, any reserved forest or land reserved for a public purpose may now be included in a Malay reservation (s. 5).

H

[56] The restrictions enumerated in the 1913 Enactment have also been consolidated and expanded to include restriction as to transfers, charges and leases (s. 8), restriction as to dealings by attorneys (s. 9), restriction as to caveats based on lien by deposit of title and other caveats (ss. 10 and 11), restriction as to bankruptcy (s. 12), restriction as to attachments in execution

I

A (s. 13), restriction as to trusts (s. 14), restriction as to grants of probate and letters of administration (s. 15) and sale by encumbrances (s. 16). It is also provided that any Malay reserve land may be charged to the Government and to certain cooperatives (s. 17). Lastly, there is a provision stipulating that the 1933 Enactment shall prevail against the provisions of other laws (s. 21).

B [57] There is no reference to customary land in the 1933 Enactment. In fact, the 1933 Enactment does not say that the Malay reserve land takes precedence over customary land. In the absence of a clear and unequivocal legislative intent to extinguish native customary land rights, we hold that the declaration under the 1913 Enactment of the Bera Malay Reservation does not extinguish the customary land rights of the aboriginal peoples.

C [58] Analogous with the reservation order in *Madeli (supra)*, the Bera Malay Reservation Order of 1923 does not vest State land in any person; it only reserves the designated land as Malay reservation under the 1913 Enactment. The lands so designated remains State lands which is encumbered by the customary land right of the respondents.

D [59] For the foregoing reasons, the second question is answered in the negative. Accordingly, we uphold the declaration of the learned judge that the portion of the Malay reserve land encroaching upon the customary land of the respondents and therefore has to be de-gazetted.

E  
**Conclusion**

F [60] In the light of our findings, we allow the appeal in part. The area of the land to be alienated for the purpose of the aborigine community should be the settled areas and the areas under which are planted rubber trees, oil palm trees or other trees by the aborigine community. Accordingly, the order of the High Court dated 19 December 2012 is varied to the extent that the identification and drawing of boundaries of the respondents' customary lands using natural boundaries of rivers and hills shall correspond as close as possible to the areas claimed.

G

---

H

I